No. 17396

United States
Court of Appeals
for the Ninth Circuit

HARVEL H. COSPER AND STELLA COSPER,
Appellants,

vs.

SOUTHERN PACIFIC COMPANY, a corporation,
Appellee.

Transcript of Record

Appeal from the United States District Court for the District of Arizona

Phillips & Van Orden Co., 4th & Berry, S. F., Calif.—Rec. 7/28/61—Printed 8/18/61

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS

ROGGE AND ROGGE

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Attorneys for Appellants.

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Valley National Building
Tucson, Arizona

Attorneys for Appellee.

In the United States District Court
For the District of Arizona

No. Civ-123 Globe

HARVEL H. COSPER and STELLA COSPER, Husband and Wife, Plaintiffs,

vs.

THE SOUTHERN PACIFIC COMPANY, a corporation, Defendant.

AGREED STATEMENT

The following agreed statement is presented by the parties in lieu of record on appeal, and is submitted pursuant to Rule 76 of the Federal Rules of Civil Procedure.

Statement of the Facts

Cosper v. The Southern Pacific Company is an action for damages and equitable relief arising from plaintiffs' claim that defendant breached an implied contract to maintain ditches and dikes on an easement granted by plaintiffs' predecessors in interest to defendant's predecessors in interest. Evidence was adduced at trial by jury and the issues were submitted by the Court to the jury with the instructions which are set out in full as Appendix A to the Statement of Facts. The jury deliberated for approximately seven hours, and at 11:10 P.M. requested clarification from the Court on certain

issues. A portion of the trial transcript covering the proceedings during the time the jury was reconvened is set out in Appendix B to the Statement of Facts. The jury then retired and, after deliberating approximately fifteen minutes, returned a verdict for defendant.

Plaintiffs made a timely motion under Rule 59 of the Federal Rules of Civil Procedure for a new trial on the grounds that the Court committed prejudicial error by instructing the jury, upon their reconvening, in conflict with the Court's previous instruction on the defense of Act of God. The portion of Appendix B from page two, line seventeen to page three, line seven was alleged by plaintiffs to be in conflict with Modified Plaintiffs' Instruction No. 6 on page 7 of Appendix A. Defendant resisted plaintiffs' motion asserting that the instructions were not conflicting and were both accurate statements of the law of the case and would not be prejudicial error even if conflicting. The Court denied plaintiffs' motion for a new trial.

ROGGE & ROGGE,
/s/ By H. EARL ROGGE, JR.

Attorneys for Plaintiffs, Appellants.

BOYLE, BILBY, THOMPSON
and SHOENHAIR,
/s/ By RICHARD B. EVANS,

Attorneys for Defendant, Appellee.

The foregoing statement, including Appendixes A, B and C, and the attached copies of the Judgment and Notice of Appeal is approved and it is directed that it be certified to the United States Court of Appeals for the Ninth Circuit as the record on appeal of the plaintiffs.

Dated this 6th day of May, 1961.

/s/ JAMES A. WALSH.

APPENDIX A

JURY INSTRUCTIONS

Court's Instruction No. 1

The plaintiffs contend in this case that while the easements dated June 6, 1935 and November 5, 1937, which are in evidence as a part of plaintiffs' Exhibit No. 9, do not contain an express agreement on the part of the grantee, El Paso & Southwestern Railway Company to maintain and keep in repair the ditch and dike involved in this action, nevertheless an implied term and agreement of the easements obligated El Paso & Southwestern Railway Company, and consequently the defendant, to so maintain and keep in repair the ditch and dike.

It is defendant's position that no such agreement on the part of El Paso & Southwestern Railway Company may be implied from the language employed in the easements and, accordingly, neither defendant nor its predecessor, El Paso & South-

western Railway Company, was obligated to maintain and keep in repair the dike and ditch.

You are instructed that a contract between parties includes not only what is expressly stated therein but also what is necessarily to be implied from the language used. In the absence of an express provision therefor, the law will imply an agreement between parties to a contract to do and perform those things that according to reason and justice they should do in order to carry out the purpose for which the contract was made.

If, from a consideration of the language employed in the easements dated June 6, 1935 and November 5, 1937, and applying reason and justice thereto, you find that in order to effectuate and carry out the intention which the parties to the easements had at the time when the easements were given by the grantors and accepted by the grantees, there must be implied an agreement on the part of El Paso & Southwestern Railway Company to maintain and keep in repair the ditch and dike involved in this case, then you may find that the El Paso & Southwestern Railway Company did contract and agree to maintain and keep in repair the dike and ditch and that defendant was bound to perform such contract and agreement made by its predecessor.

In the event you do not find it necessary in order to effectuate the intention of the parties to the easements to imply such a contract and agreement on the part of El Paso & Southwestern Railway Com-

pany, then the defendant is not bound to maintain the ditch and dike and keep them in repair and plaintiffs may not recover in this action.

Court's Instruction No. 2

I instruct you that so far as the issue of damages is concerned in this case, you are limited to considering only whether the plaintiffs have suffered a loss of use of their lands, since plaintiffs may not in this case recover damages for any other loss or injury.

Court's Instruction No. 3

Before plaintiffs are entitled to recover any damages on their complaint, they have the burden of proving by a preponderance of the evidence that: (1) The defendant, as successor to El Paso & Southwestern Railway Company, contracted and agreed to maintain and keep in repair the ditch and dike involved in this action; (2) that the defendant breached such contract; and (3) plaintiffs suffered damages naturally resulting from such breach. If plaintiffs have failed to prove by a preponderance of the evidence any of the foregoing requirements, then your verdict should be for the defendant.

Court's Instruction No. 4

I instruct you that you must find from the evidence in this case that plaintiffs are now and have been since before May 3, 1956 the owners of the

55 acres of land in relation to which they claim damages in this action.

Court's Instruction No. 5

I instruct you that even though you find from the evidence and under these instructions that the defendant had the contract obligation to maintain and keep in repair the dike and ditch constructed by El Paso & Southwestern Railway Company on plaintiffs' property, if you find further from a preponderance of the evidence that defendant's maintenance of the dike and ditch in full compliance with its obligation would not have protected the lands of plaintiffs from surface flood waters at times when the same are subject to being flooded by heavy rainfall upon the watershed draining toward and upon said lands, then in such event the defendant had the right to abandon the maintenance of the dike and ditch upon plaintiffs' land and to seek other methods of accomplishing the protection of plaintiffs' land from flood waters which was intended by the construction of the dike and ditch upon plaintiffs' land.

Modified Plaintiffs' Requested Instruction No. 6

You are instructed that the defense of an act of God does not relieve the defendant from responsibility for damages resulting from breach of contract, if you find such a breach, but should be considered solely in determining what portion of plaintiffs' damage, if any, was actually caused by the

defendant's alleged breach of contract.

By the term "act of God" is meant something superhuman—something beyond the power of man to guard against. It means inevitable accident—something that happens without the intervention of man.

By the term "act of God" is meant those events and accidents which proceed from natural causes, and cannot be anticipated and guarded against, or resisted.

If the Jury find, from the evidence and under these instructions, that defendant was guilty of a breach of contract and that as a result of such breach plaintiffs suffered damage which could have been prevented by defendant's maintenance of the ditch and dikes, then the damage was not produced by an act of God, within the meaning of the law.

Modified Plaintiffs' Requested Instruction No. 7

Upon the allegations of the plaintiffs' complaint, therefore, you are instructed that in order to recover herein upon their complaint the burden is upon the plaintiffs to prove affirmatively the allegations of their complaint by a preponderance of the evidence as just defined. Likewise, the burden is upon the defendant to prove the allegations of its affirmative defense or defenses by a preponderance of the evidence. But this does not mean that the party upon whom such a burden rests must produce the witnesses by whom the burden is borne.

The burden may be sustained by the evidence, whether given by a party's own witnesses or those of his adversary, either on direct or cross-examination.

Plaintiffs' Requested Instruction No. 9

The agreements in evidence in this action contain covenants by the plaintiffs to save the defendant harmless from any damage which might occur from defendant's construction and maintenance of the dikes and ditches. The Jury is instructed to carefully scrutinize these covenants to determine what the parties actually intended. I further instruct you that clauses of this type are to be strictly construed, that is, the words are to be taken to mean only what they say, nothing more.

Modified Plaintiffs' Requested Instruction No. 10

If the Jury finds that the "save harmless" clause was not intended by the parties to the easements to exempt the defendant and its predecessor from liability for intentional failure to maintain the dikes and ditches, then such clause would not relieve defendant from liability if you find from the evidence and under these instructions that defendant did have a contract obligation to maintain and keep in repair the ditches and dikes and that it breached such contract.

Modified Plaintiffs' Requested Instruction No. 12

In the event you find a verdict in favor of the plaintiffs and the defendant, then if you find further from a preponderance of the evidence that as a natural result of the breach by defendant of the agreement to maintain and repair the dike and ditch, plaintiffs suffered, after May 3, 1956, and before February 1, 1960, the loss of use of some of their lands, then you may award plaintiffs the fair and reasonable value, as shown by the evidence, of the loss of use of such lands.

I instruct you that the use value of the land is the fair and reasonable value, as shown by a preponderance of evidence, the plaintiffs would have derived from its actual use during the period in question.

Modified Plaintiffs' Requested Instruction No. 13

You are instructed that if you find from a preponderance of the evidence and under these instructions, that El Paso & Southwestern Railway Company did contract and agree to maintain and keep in repair the ditch and dike involved in this case, as alleged by plaintiffs, and if you find further that the defendant has failed or refused to maintain and keep in repair the dike and ditch, and that as a natural result of such failure or refusal plaintiffs have suffered damage, then your verdict shall be in favor of the plaintiffs.

Modified Defendant's Requested Instruction No. 1

Where a party is entitled to the benefit of a con-

tract and can save himself from loss arising from a breach thereof by the making of reasonable expenditures or with reasonable exertions, it is his duty to do so, and he can charge the party in default with such damages only as with reasonable endeavors and expense he could not prevent.

Modified Defendant's Requested Instruction No. 4

The damages to which one party to a contract is entitled because of a breach thereof by the other are such as arise naturally from the breach itself, or such as may reasonably be supposed to have been within the contemplation of the parties at the time of making the contract as a probable result thereof. Conversely, damages which do not arise naturally from a breach of the contract, or which are not within the reasonable contemplation of the parties, are not recoverable.

Defendant's Requested Instruction No. 7

You are instructed that in no event are plaintiffs entitled to recover from defendant for damages, if any, done to plaintiffs lands lying in the SE¼ of Sec. 19, Township 6 South, Range 31 East, G. & S. R. B. & M., Greenlee County, Arizona, more particularly described as follows:

Beginning at the northwest corner of the Southeast quarter of said Section 19; thence South 45° 50′ East 197.0 feet to point of beginning of property to be described; thence South 86° 01′ East,

a distance of 504.0 feet to a point; thence South 14° 08′ West a distance of 987.5 feet to a point; thence North 86° 01′ West a distance of 330.0 feet to a point; thence North 3° 59′ East along the easterly right of way line of the Arizona and New Mexico Railway Company a distance of 972.0 feet to a point of beginning,

for the reason that plaintiffs' predecessors in title to the above described land granted to the defendant on September 2, 1930, a right of way for the purpose of passing flood and drainage waters over the said land.

Defendant's Requested Instruction No. 8

You have been instructed on the subject of the measure of damages in this action because it is my duty to instruct you as to all the law that may become pertinent in your deliberations. I, of course, do not know whether you will need the instructions on damages, and the fact that they have been given to you must not be considered as intimating any view of my own on the issue of liability or as to which party is entitled to your verdict.

Modified Defendant's Requested Instruction No. 11

In your consideration of this case, and in determining whether or not damages are to be given, you must not permit yourselves to be influenced in the slightest degree by any emotion or feeling of charity or sympathy. Such feelings and emotions, however proper in themselves, have no just place in the con-

sideration by you of a case of this kind. In making your determination in this case, you cannot in any measure substitute prejudices or feelings or sympathies or passions for the evidence, as the basis of an award. Nor can you make a finding against a party based on mere guess, speculation or conjecture. You must make your determination only upon a consideration of the evidence before you, and the instructions which have been given to you by the court.

Defendant's Requested Instruction No. 12

In your consideration and determination of this case you must treat it as litigation between persons of equal standing in the community. Your determination should not be affected in any way by reason of the fact that one of the defendants is a railroad or a corporation, nor should you be in any way influenced, one way or the other, by any thoughts or ideas you may have as to the financial standing of any party to this litigation. Such matters have no proper place in the consideration of a case of this kind. This case is to be considered and determined by you just as you would consider and determine any litigation between private individuals.

APPENDIX B

Partial Transcript
11:10 P.M.

The Court: Mr. Foreman, I understand the jury has a question about an exhibit that is in the case?

The Foreman: Yes, your Honor, we have.

The Court: Will you state it?

The Foreman: It is the stated ruling on right-of-way maintenance by the dominant possessor versus the subservient possessor. The question is whether we should use that interpretation from another State as a fact in this State, or whether we should not.

The Court: Let the record show that the Foreman is referring to Plaintiff's Exhibit 11 in evidence. And I take it this quotation from the case?

The Foreman: Yes, your Honor.

The Court: No, that has no force with you. The only law that you will apply in this case is the law that I gave you in the instructions. This is just somebody's quotation from a Washington case, and you are not to regard it as a matter of law. The only law that you will consider is the law that I gave you in the instructions.

The Foreman: Very well, sir. Your Honor, there is one other question we have. The agreement of 1937 and your instructions we are a little hazy as to whether the agreement is binding in its actual writing or in its actual writing and its implied writing.

The Court: Well, if you find an implied agreement in that easement, then it is the same as if it was expressed in there. Your question with regard to the easement is from an examination, a consideration of the terms and the provisions of that easement, the express terms, do you find that, using reason and a sense of justice, that you must imply an

agreement to maintain and keep in repair the dyke and ditch in order to make effective the intention which the parties on that agreement had when they made it. If you do find that, then there would be an implied term or agreement in the easement. If you don't find it, if you don't find that that is necessary in order to effectuate the intention of the parties when they made the written agreement, then of course there is no implied agreement. That is what you will determine.

The Foreman: Yes, sir.

The Court: If you do find an implied agreement, then it's as binding as if it was expressed. Of course if you don't find one, then there is none. Does that cover it?

The Foreman: Yes, your Honor, I believe that answers the question.

Your Honor, did you get the slip of paper from the Bailiff with another question on it?

The Court: Yes, the question as I interpret it, it's not in the form of a question, is whether or not you could find for the plaintiff but no money for compensation. I take it that you have in mind, or if this what you have in mind, that you find that there was an obligation to keep the dyke and ditch in repair, and that it was breached but that the plaintiffs were not damaged, could you return a verdict in their favor and give them no money since they had no damages. I take it that's the sense of the question?

The Foreman: Your Honor, our thought behind this was that, through damage, the damage to the plaintiffs' property was caused by an act uncontrollable by man or an act of God, but there was a moral obligation in the maintenance of the ditches and dykes.

The Court: Well, let me say that if you found that the damage was caused by an act of God, and that it could not have been prevented by the compliance with the contract, then there would be—your verdict would have to be for the defendant. In other words, if the damage was caused by an act of God and it couldn't have been prevented if the defendant had carried out its contract, it would have happened anyway because of the forces of nature, then your verdict would be for the defendant, if that is what you found.

The Foreman: The thought behind it, your Honor, was that actually we have not reached a unanimous agreement, but these points and questions were the ones that we felt were separating us from a unanimous agreement.

The Court: Very well, Have I answered the questions that you had now?

The Foreman: Yes, your Honor, you have.

The Court: Well then, supposing you retire then and continue your deliberations.

The Foreman: Thank you, your Honor.

APPENDIX C

APPELLANTS' STATEMENT OF POINTS

1. "Act of God" is not a defense to a claim for breach of contract, but merely goes to the cause of the damage.

2. The instruction on "Act of God" as set out in Appendix B is an erroneous statement of the law of the case and in conflict with the earlier instruction given as set out in Appendix A.

3. Conflicting instructions on a material issue constitute reversible error.

4. The Court's error was obviously prejudicial to appellants' cause for the following reasons:

(A) All of the questions asked by the jury as reported in Appendix B were answered favorably to appellant, except the answer to the jury's question on "Act of God," which was answered favorably to appellee.

(B) The jury returned a verdict almost immediately after retiring for the second time, although they had deliberated for almost seven hours before the erroneous instruction was given.

5. The foreman's comments indicate that the jury may well have brought in a verdict for the plaintiff for nominal damages had they been correctly instructed.

6. A verdict for nominal damages may have moved the Trial Court to grant the equitable relief which plaintiffs sought.

7. The prejudicial error committed by the Trial

Court can only be corrected by the reversal of the judgment and Trial Court's order denying appellants' motion for a new trial and remanding this case with the direction that a new trial be ordered.

[Endorsed]: Filed May 6, 1961.

[Title of District Court and Cause.]

DOCKET ENTRY

Date

1960

* * * * *

1961

* * * * *

Jan. 12—Enter judgment in favor of the defendant, The Southern Pacific Company, and against the plaintiffs, Harvel H. Cosper and Stella Cosper, husband and wife; that plaintiffs take nothing by their complaint and that defendant have its costs.

* * * * *

Certification Attached.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Harvel H. Cosper and and Stella Cosper, plaintiffs above named, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the Order denying plaintiff's motion for a new trial entered in this action on February 1, 1961.

ROGGE & ROGGE,
By H. E. ROGGE, JR.
Attorneys for Appellants, Harvel H. and Stella Cosper.

Notice of Mailing Attached.
[Endorsed]: Filed March 3, 1961.

[Title of District Court and Cause.]

CLERK'S CERTIFICATE TO RECORD ON APPEAL

United States of America
District of Arizona—ss:

I, Wm. H. Loveless, Clerk of the United States District Court for the District of Arizona, do hereby certify that I am the custodian of the records, papers and files of the said Court including the records, papers and files in the case of Harvel H. Cosper and Stella Cosper, husband and wife, Plaintiffs, vs. The Southern Pacific Company, a corporation, Defendant, numbered Civil-123 Globe, on the docket of said Court.

I further certify that the attached and original documents bearing the endorsements of filing thereon are the original documents filed in said case, and that the attached and foregoing docket entry showing entry of judgment and copy of Notice of Appeal are true and correct copies of the originals thereof remaining in my office in the City of Tucson. I further certify that said original documents and said copies of the civil docket entry and of the Notice of Appeal constitute the entire record on appeal in said case pursuant to Agreed Statement submitted in accordance with Rule 76 of the Federal Rules of Civil Procedure and approved by the District Court, and the same are as follows, to-wit:

1. Agreed Statement, approved by the District Court and filed on May 6, 1961

2. Appendix A, Jury Instructions, filed on May 6, 1961

3. Appendix B, Partial Transcript, filed on May 6, 1961

4. Appendix C, Statement of Points, filed on May 6, 1961

5. Certified copy of the Notice of Appeal, filed on May 6, 1961, and certified copy of the civil docket entry of January 12, 1961, entered in the Civil Docket on January 12, 1961

Witness my hand and the seal of this Court this 24th day of May, 1961.

[Seal] WM. H. LOVELESS,
Clerk,
/s/ By ERMELIA COLE,
Deputy Clerk.

[Endorsed]: No. 17396. United States Court of Appeals for the Ninth Circuit. Harvel H. Cosper and Stella Cosper, Appellants, vs. Southern Pacific Company, a corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Arizona.

Filed May 25, 1961.
Docketed June 6, 1961.

/s/ FRANK H. SCHMID,
Clerk of the United States Court of Appeals for the Ninth Circuit.

ROGGE & ROGGE

Attorneys at Law

209 Arizona Land Title Bldg.

Tucson, Arizona

July 24, 1961

Mr. Frank H. Schmid, Clerk
U. S. Court of Appeals
9th Circuit
San Francisco 1, California

Re: Cosper v Southern
Pacific Co., #17396

Dear Sir:

I received your letter concerning the statement of points and designation of record. I requested that you send me a copy of the Rules of Court in my letter of June 1, 1961. If you will comply with my request I may be better able to clear up whatever problems exist.

I call your attention to the fact that the record certified to you by the District Court is an agreed statement submitted in accordance with Rule 76 of the Federal Rules of Civil Procedure. This record shall constitute the entire record on appeal. The record contains a statement of points which we adopt as our statement of points on appeal.

I thank you in advance for your prompt attention to this matter and particularly the mailing of a copy of the Rules of Court.

Very truly yours,

ROGGE, ROGGE & STARK,
/s/ THOMAS A. STARK.

TAS:m

[Endorsed]: Filed July 27, 1961. Frank H. Schmid, Clerk.